United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74 2204

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

NO. 74 - 2204

John F. Gangemi and Jennie Di Carlo,
Plaintiffs-Appellants,

-against-

Salvatore Sclafani, Herbert J. Feuer, Alice Sachs, Elizabeth A. Cassidy, Charles Avarello, Anthony Sadowski, Stanley C. Kochman, Joseph Previte, Elrich A. Eastman, in their official capacities as Members of the New York City Board of Elections, and The New York City Board of Elections, a Governmental Entity,
Defendants-Appellee

-and-

Angelo J. Arculeo,
Intervenor Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF INTERVENOR-APPELLEE

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STATEMENT OF FACTS

A designating petition, which hereafter shall be referred to as the "GANGEMI PETITION", was timely filed with the Board of Elections. Said GANGEMI PETITION purported to designate candidates for two party positions only, to wit: Male and Female Members of the Republican State Committee from the 49th Assembly District, and a small number of candidates as members of the County Committee from 69 Election Districts within said 49th Assembly District.

It was conceded at Special Term that whatever affected GANGEMI affected the validity of the entire petition. It was further stipulated that respondent GANGEMI prepared a petition which listed him as a County Committee candidate in 25 separate Election Districts; that all of the subscribing witnesses who were also running for County Committee were approached by GANGEMI and requested by him to run with him for that office, and to obtain signatures for his candidacy for State Committeeman and County Committeeman as his running mate for County Committee, and thereafter the signatories to the GANGEMI PETITION were advised that GANGEMI was a candidate for County Committee in their respective local Election Districts; that campaign literature was given out to each of the signatories to the petition with GANGEMI'S picture on it; and that said subscribing witnesses then returned the completed petitions pertaining to each of the 25 Election Districts to respondent GRANCIO, GANGEMI'S law partner.

GANGEMI is an attorney, well experienced in Election contests, having been involved in Election litigation both before and after Primary contests in the past.

The Appellants herein skillfully sought to manipulate and disenfranchise the voters of the 49th Assembly District by the following device: GANGEMI approached various innocent individuals and asked them to obtain signatures for him as his running mate for member of the County Committee. Each running mate obtained signatures from his neighbors and friends. Each running mate was unaware that GANGEMI was using other running mates to obtain signatures by the same device.

It is in this manner that GANGEMI craftily assembled a small working force and began to defraud the voters of the 49th Assembly District.

The "GANGEMI PETITION" sought to nominate him as State Committeeman form the 49th Assembly District and as County Committeeman from 25 separate and distinct Election Districts, more than 33 percent of the Assembly District. His name was listed as candidate in both positions on 78 separate pages of the designating petition out of a total of 248 pages.

Signatories to the "GANGEMI PETITION" were fraudulently induced to believe that GANGEMI would be their representative as County Committeeman on Party Affairs from their own smallest of all political subdivisions, their home Election District; as well as State Committeeman from the entire Assembly District. All of the State Courts and the United States District Court have so found in their decisions.

This belief on the part of the signatories could, of course, never be fulfilled as GANGEMI knew that he could only serve as County Committeeman from only one Election District.

Therefore, more than one-third of the signatories to the designating petition were fraudulently induced to sign said petition based upon GANGEMI'S fraud and deception. GANGEMI never took the stand to offer any explanation of this conduct.

This fraudulent inducement did not stop with GANGEMI , JENNIE DI CARLO, his running mate for Female Member of the State Committee, used the same artifice and device in three separate Election Districts. She also failed to offer any explanation at the hearing below.

The multiplicity of Candidacies for County Committee takes place on 40 separate occasions out of 69 Election Districts, and on 113 pages out of 248 pages. The percentages of fraud and deception are, therefore, more than 57 percent with regard to Election Districts and more than 48 percent with regard to pages.

The record is barren of any testimony by either of the appellants on this issue.

This intervening-appellee contended in State Court that such fraudulent inducements justified the conclusion that the "GANGEMI PETITION" was "permeated with fraud" as a matter of law.

While Special Term agreed that running for incompatible offices was in fact "deception which constituted fraud," it nonetheless held on the authority of Trongone v. O'Rourke, 58 Misc. 2d 6, that once the conflict of Offices is resolved, (despite the gross nature of the fraud practiced) the candidate should be permitted to run for the remaining office.

The Appellate Division affirmed, without opinion, by a 3-2 vote. Justices SHAPIRO and BENJAMIN, however, in a vigorous dissent characterized the activities of GANGEMI as "tantamount to a fraud on the electorate" indicating that the practices outlined below definitely "should not be encouraged".

The dissenting opinion further stated:

"We agree with the statement of the court in Matter of Ryan v. Murray (172 Misc. 105, affd. 257 App. Div. 1068) deploring such practice, but we do not agree with its conclusion that the offender should be prepared to run in one district of his subsequent choice. Furthermore, we do not agree with the determination in Matter of Trongone v. O'Rourke (68 Misc. 2d 6 affd. 37 A.D. 2d 763) that, despite the practice of deception and fraud on the enrolled voters of the party, the candidate should receive the benefit of being permitted to run in one election district."

The Court of Appeals in discussing the facts which had already been determined in the courts below, indicated that it must be the guardian of the rights of the citizens of the State of New York by protecting said citizenry from fraud, deception, being misled, and other harms which were perpetrated upon them by the appellants herein.

In discussing the conduct of these appellants the Court of Appeals stated that the appellants' actions have been properly recognized as "injurious to the rights of the electorate", and "described as fraudulent and deceptive."

The Court of Appeals would not lightly remove an individual from the ballot, but in looking at the actions of these two appellants alone, said court found Appellants' actions to have been an intentional disenfranchisement of innocent voters, stating, "Thus, the

petitions must be considered to have bben permeated with the defect intentionally introduced into them by the circulators and those candidates who participated in the circulation."

The Court of Appeals further considered the rights of the citizens of the State of New York as having been harmed by these candidates for the reasons set forth above and for other reasons. Another reason advanced by our highest court was as follows: "These irregularities were also harmful because those who signed were precluded by law from signing petitions for other candidates for the same office."

The Court of Appeals in its great wisdom, provided a natural remedy in its decision for candidates who unknowingly had committed an error. In its decision the court would permit innocent candidates to go forward and offer any "acceptable excuse or justification".

Thereafter, on September 3rd 1974, Appellants commenced this action soley against the New York City Board of Elections, a ministerial agency.

Appellants although strongly concerned about their constitutional rights, gave no notice of this pending action to any of the petitioners in the State Court proceeding, not to the other candidates for Party Positions of State Committeeman and State Committeewoman.

Only the Intervenor-Appellee, Arculeo learned of the action in sufficient time to intervene. None of the other parties received any notice of this proceeding not did they appear herein.

Nonetheless, the United States District Court, Honorable Jack B. Weinstein presiding,"reluctently" assumed jurisdiction.

Judge Weinstein exhaustively reviewed each and every allegation of the appellant herein as to alleged violations of their constitutional rights.

Judge Weinstein found, as both fact and law, that no irrebuttable presumption of fraud was created in this case.

Furthermore, Judge Weinstein found that the Voting Rights Act of 1965 was not applicable to this proceeding.

Judge Weinstein concluded however, that the New York State Court of Appeals had advanced a compelling state interest by the least drastic means in removing appellant form the ballot.

POINT I

THE UNITED STATES DISTRICT COURT WAS CORRECT IN HOLDING THAT THE NEW YORK STATE COURT OF APPEALS HAD ADVANCED A COMPELLING STATE INTEREST BY THE LEAST DRASTIC MEANS IN REMOVING APPELLANT FROM THE BALLOT.

In the case at bar, appellants had effectively disenfranchised more than 57 percent of an entire Assembly District through a fraudulent scheme and device.

This factual determination had been reached by all of the State Courts and by the United States District Court.

Having been found to have perpetrated a fraud upon the voters, and having been further found to have effectively cheated and misled the voters by a scheme which would have resulted in wasted votes (said votes being cast for a nullity),the New York State Court of Appeals was justifiably concerned about protecting the citizenry of the State of New York from future actions of this type.

This scheme used by these appellants, if unchecked, would result in an autocracy.

The striking from the ballot of all candidates except one, would not effectively terminate the fraud. Without a striking of the entire designating petition, the committee on vacancies would survive such action.

Therefore, the mere disqualification of the multiple candidacies, would permit the committee on vacancies (the family and close friends of these appellants) to fill such candidacies with individuals totally under the control of the appellants herein.

What more compelling State interest could the New York State Court of Appeals have had other than to protect the elective franchise of its citizens from fraudulent and deceptive practices as intentionally inflicted upon them by the appellants herein ?

Appellees respectfully submit that the New York State Court of Appeals in Lutfy v. Gangemi fulfilled its highest moral and legal obligation to the citizenry of the State of New York by giving it shelter from the harmful injury which was intentionally inflicted upon them by the Appellants herein.

It was the appellants herein who deprived more than 57 percent of an Assembly District of their elective franchise.

It was for the very protection of the voters that the Court of Appeals applied the least drastic means in striking the designating petitions of the appellants.

The very vice of the situation would have been to allow any candidacy to survive.

The candidacies for State Committee and County Committee carried the same Committee on Vacancies.

Had the petitions been allowed to survive, the Committee on Vacancies which was composed of the relatives and close friends of the offending candidates, would have been able to fill these vacancies with individuals totally under the control of the perpetrators of the fraudulent scheme.

In exercising its inherent duty and obligation to protect the voters from the fraudulent practices of candidates, the New York State Court of Appeals used the only means available to it to advance this compelling public interest.

The United States District Court for the Eastern District of New York, Weinstein J., made the following statement in pages 16 and 17 of his decision:

> "The United States Supreme Court has imposed a rigorous standard in measuring the constitutionality of state action which restricts the franchise. Thus, in order to justify a classification or requirement which effectively denies access to the ballot, a state must demonstrate that the requirement involved advances a compelling state interest by the least drastic means. Dunn v. Blumstein, 405 U.S. 330 (1972).
>
> In the instance before us, we have a striking proof that the means urged on us by the plaintiff are not workable. Despite the fact that for some third of a century the practice engaged in by plaintiff has been denominated a fraud and a danger to free elections by the state, these plaintiffs persisted in it. We are not in a position to say that the means chosen by the New York Court of Appeals to prevent a recurrence of such violations of New York's election laws were not sound under the circumstances. Compelling state interests justify the New York Court of Appeals action against plaintiffs in this case. The state has met its "heavy burden of justification." Dunn v. Blumstein, 405 U.S. at 343." (Emphasis Supplied)

Clearly, the Federal judiciary and the State judiciary agreed that the outrageous fraud of these appellants was a danger to free elections in the State of New York and a peril to the citizens of the state.

Obviously, the New York State Court of Appeals advanced a compelling State interest by the least drastic means.

POINT II

THE UNITED STATES DISTRICT COURT CORRECTLY FOUND THAT THE NEW YORK STATE COURT OF APPEALS IN LUTFY V. GANGEMI NEVER ESTABLISHED A CONCLUSIVE PRESUMPTION. IT MERELY RULED UPON A FACTUAL SITUATION AND THE NATURAL INFERENCE THEREFROM.

Having established as fact that the appellants herein, in an intentional and deliberate manner, were guilty of fraud in that they skillfully devised a scheme to defraud the voters of more than 57 percent of an Assembly District, the State of New York Court of Appeals took the position in its decision that the burden of coming forward had shifted to the appellants herein.

Their refusal to testify, even though they were parties to the action and were ably represented by distinguished counsel, led the Court to the natural inference of an intentional perpetration of fraud.

The highest Court of the State of New York stated:

> "With this practice and absent acceptable excuse or justification, the voters who signed the offending petitions must be assumed to have been misled as to the candidates intentions....."

Appellants would have this Honorable Court construe the words "and absent acceptable excuse or justification" as an irrebuttable conclusive presumption.

Appellees can not begin to imagine such a distorted construction of the English language.

The United States District Court in reviewing this contention of Appellants stated at Pages 12 and 13:

> "But we do not find that an irrebuttable presumption of fraud was created here. There was a stipulation that plaintiffs deliberately used the device here. There was an implicit finding of fraud even though not of pervasise fraud. These litigants had a full hearing in the trial court. No irrebuttable presumption was created. Future candidates are free to show lack of fraud, in fact." (Emphasis Supplied)

Appellants would mislead this court into believing that the Board of Elections will act in the future to invalidate the candidacy of an individual who is listed for more than one party position due to error.

This, of course, is not true since the Board of Elections is a ministerial agency only, and as such, has no power to rule on questions of fact. Vol. 1, Gassman Election Law, 343; In Re Bednarsh 267 App. Div. 133; In Re Mc Govern 291 N.Y. 104; In Re Lindgren 232 N.Y. 59.

Therefore, the future questions of fraud or error, will be factually determined in trial courts. No inflexible standard has been created. Each future case involving a similar question will turn on its own unique fact pattern then and there presented.

It is for this reason that the sound discretion of future judicial interpretations and decisions under this ruling should not be given the same disposition as uniform legislative enactments.

In 1970 the United States District Court, Second Circuit, decided that state courts were not "persons" within the purview of the Civil Rights Act. Zuckerman v. Appellate Division, Second Dept., S. Ct. of N.Y., 421 F. 2d 625.

The United States Court of Appeals for the Second Circuit in affirming the District Court stated in 421 F. 2d 626:

> "For a number of reasons, there are grave doubts as to the jurisdiction of this court to proceed in such a case under section 1983. See, e.g. Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L Ed. 2d 1342 (1957). However, it is unnecessary for us to go into these problems since it is quite clear that the Appellate Division is not a "person" within the meaning of 42 U.S.C. Section 1983.."

An earlier case, Bradford Audio Corp. v. Pious 392 F. 2d 67, established this principal for the Second Circuit of the United States Court of Appeals.

The Bradford case also dealt with a ministerial agent of a court.

In the case at bar, the Board of Elections is solely a ministerial agency. In its ministerial capacity, the Board of Elections can do nothing more or less than what a court orders it to do. It can also act ministerially only with regard to any legislatively enacted statute.

In passing upon this precise question, the Second Circuit held in Bradford at Page 72 of 392 F. 2d as follows:

> "If, however, it is assumed, arguendo, that Section 1983 does apply here, still the appellant cannot recover. We held that the appellee as a court appointed receiver doing no more and no less than to carry out an explicit order, fair and regular on its face,.....was immune from liability to the appellant..."

Is it appellants' contention that the New York State Court of Appeals is a "person" and as such willfully discriminated against the appellants? Of course, there is no merit in such contention.

This honorable court, as recently as 1970, in Powell v. Power 436 Federal Reporter 2d 84, 86, stated the following:

> "Absent a clear and unambiguous mandate from Congress, we are not inclined to undertake such a wholesale expansion of our jurisdiction into an area which, with certain narrow and well defined exceptions, has been in the exclusive cognizance of the state courts."

Appellants erroneously raise the question that the Voting Rights Act of 1965 requires a reversal of the District Court.

Clearly, in the case at bar, that act provides no remedy.

In reviewing this question, the District Court stated at Page 13 of its decision:

> "The Voting Rights Act of 1965 does apply to New York State. See Rosario v. Rockefeller, 93 S.Ct. 1245 (1973). Nevertheless, this act has previously been interpreted by the Court of Appeals for this Circuit as being designed primarily to prevent racial discrimination. See Powell v. Power, 436 F. 2d 84 (2d Cir. 1970). There is not the slightest hint of racial overtones in this case and it would be a futile exercise to require the extensive procedures of the 1965 Voting Rights Act to be followed. As the Court of Appeals noted in Powell V. Power, 436 Fed. at 87: 'Since the plaintiffs expressly disavow the claim that they are the victims of any racial, or indeed any other purposeful and wrongful discrimination, the Act provides no remedy'."

Appellants also raise Title 42, Section 1973c as an alternative remedy to Title 42, Section 1983.

They have reached an erroneous conclusion in raising said section in the same manner that they have erroneously concluded that the other sections apply.

Title 42, Section 1973c in inapplicable for many reasons, some of which are:

Title 42, Section 1973c was enacted for the limited purpose of protecting individuals whose voting rights were being discriminated against by virtue of their race or color.

Section 2 of the Voting Rights Act of 1965 in fact states, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." No claim is made by the plaintiffs that their voting rights have been discriminated against by the Court of Appeals because of their race or color.

Furthermore, Title 42, Section 1973c applies solely to legislative enactments which abridge voting rights on account of race of color.

It is inconceivable that the Congress intended that every decision of the highest State Courts be subject to Federal review under the Voting Rights Act. The judicial arm of a State has always been considered to be a separate entity from the legislative arm.

No case ever held, nor was it in fact ever intended by the Congress, that the judicial interpretation of a state law would be subject to review by the District Court of the District of Columbia prior to its enforcement.

CONCLUSION

THE DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK MUST BE AFFIRMED IN ALL RESPECTS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Eugene Gibilaro certifies that on the 9th day of October, 1974, I did serve a copy of the foregoing Brief on the appellants by mailing the same first class, postage prepaid to their attorneys: James I.Meyerson, 1790 Broadway, New York, New York; Thomas Hoffman, 200 West 57th Street, New York , New York; Joseph P. Grancio, 8302 13th Avenue, Brooklyn, New York; Louis J. Lefkowitz, 2 World Trade Center, New York, New York and Corporation Counsel, Municipal Building, New York, New York 10007.

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